

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4**

**REGIONAL PRODUCE COOPERATIVE
CORPORATION d/b/a PHILADELPHIA
WHOLESALE PRODUCE MARKET¹**

Employer

and

Case 04-RC-227202

**TEAMSTERS LOCAL 929 a/w INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Board has a longstanding policy of excluding confidential employees from bargaining units based on the rationale that employers should not be required to negotiate labor relations matters with employees who are represented by a union and who assist and act in a confidential capacity to its managers who formulate, determine, and effectuate management policies in the labor relations field. *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 US 170, 180-181 (1981); *B. F. Goodrich Co.*, 115 NLRB 722 (1956). The Petitioner, Teamsters Local 929, filed a petition with the Board seeking an election for three office clerical employees—Receptionist Nadia Franzone, Accounts Payable Clerk Patricia Pumphrey,² and Accounts Receivable Clerk Robin Edwards. The Employer contends that Pumphrey and Edwards are confidential employees and should be excluded from the unit. However, as explained below, I have concluded that the Employer has not met its burden of proving that these two employees should be excluded as confidentials, because the limited access they have to labor-relations related materials does not meet the test for confidential status.

A Hearing Officer of the Board conducted a hearing regarding the petition on September 21, 2018. After carefully considering the evidence and arguments presented, I conclude that Patricia Pumphrey and Robin Edwards are not confidential employees and should be included in the petitioned-for unit. Accordingly, I shall direct an election in the appropriate petitioned-for unit.

¹ The name of the Employer appears as amended at the hearing to reflect its correct legal name.

² Although the Employer presented a written job description listing this position as Office Manager/Accounts Payable Associate, Pumphrey testified that her correct title is Accounts Payable Clerk and that she never held the position of office manager and was never informed that she was the office manager.

OVERVIEW OF THE EMPLOYER'S OPERATIONS

The Employer operates and manages a wholesale market located at 6700 Essington Avenue, Philadelphia, Pennsylvania that sells fruits, vegetables, and produce to restaurants, grocery stores, and individual customers. The produce market is located in a large refrigerated warehouse where approximately 27 to 30 vendors sell their goods from 64 separate stalls. The second floor of the facility contains offices for the vendors, as well as a separate office space for the Employer's managerial and clerical employees.

The Employer is ultimately run by a Board of Directors. Each of the 11-12 directors is a shareholder of the Employer and a principal of one of its vendors. General Manager Daniel Kane runs the Employer's day-to-day operations. Associate General Manager John Rennie works directly under Kane. The Employer also employs clerical, maintenance, and security personnel. There are separate supervisors for the maintenance and security employees.

The Employer is a party to three separate collective-bargaining agreements with the Petitioner—a multiemployer “street” contract for employees directly employed by the vendors, and separate agreements for the maintenance and security employees.

THE CONFIDENTIAL EMPLOYEE EXCLUSION

The National Labor Relations Act (Act) broadly defines the term “employee” as “any employee,” with certain specific exclusions, such as supervisors and independent contractors. 29 USC § 152(3). Although the Act does not expressly exclude confidential employees, soon after the Board's inception it was confronted by the question of how to handle employees with a role in effectuating their employer's labor relations policies. Since at least 1939, four years after the passage of the Act, the Board has adopted a policy of excluding confidential employees from bargaining units. *Brooklyn Daily Eagle*, 13 NLRB 974, 986 (1939).

Initially, the Board excluded all employees with access to confidential materials. However, in *Ford Motor Co.*, 66 NLRB 1317 (1946) and again in *B. F. Goodrich Co.*, 115 NLRB 722 (1956), the Board refined its test with the explicit intent of narrowing its applicability. Henceforth, the Board would exclude only “those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.” *B. F. Goodrich Co.*, *supra*, at 724. The Board developed the “labor-nexus” test to determine confidential employee status, examining whether the disputed employee: “(1) shares a confidential relationship with managers who formulate, determine, and effectuate management policies in the field of labor relations; and (2) assists and acts in a confidential capacity to such managers.” *Waste Mgmt. de Puerto Rico*, 339 NLRB 262, 262 fn. 2 (2003). The party asserting confidential status has the burden of providing evidence to support its assertion. *SS Joachim Residence*, 314 NLRB 1191, 1196 (1991).

Since developing the labor-nexus test, the Board has ruled on many occasions that “merely having access to files containing confidential material, including records of grievances, does not establish confidential status.” *Lincoln Park Nursing Home*, 318 NLRB 1160, 1164

(1995); see also, e.g., *Bakersfield Californian*, 316 NLRB 1211, 1212 (1995); *Associated Day Care Services*, 269 NLRB 178, 180-181 (1984) (personnel files, minutes of management meetings, and grievance responses); *The Washington Post Co.*, 254 NLRB 168, 196 (1981). Moreover, “the typing of disciplinary matters, grievances, or other material relating to personnel problems” does not render an employee a “confidential employee” within the meaning of Board law. *Lincoln Park*, supra, at 1164. “What is contemplated . . . is that a confidential employee is involved in a close working relationship with an individual who decides and effectuates management labor policy and is entrusted with decisions and information regarding this policy before it is made known to those affected by it.” *Intermountain Rural Electric Association*, 277 NLRB 1, 4 (1985), enfd, 1988 WL 166520 (10th Cir. 1988), cert. denied, 490 U.S. 1046 (1989). However, in *Pullman Standard Division of Pullman*, 214 NLRB 762 (1974), the Board found confidential status and excluded a group of employees who had “regular access” to “precise labor rates to which the employer in pursuit of its own labor policy would be willing to agree in some future collective-bargaining agreement.” Id at 763. The Board has since applied the holding in *Pullman* narrowly to exclude employees with regular access to labor relations materials “which, if prematurely disclosed to the union, would prejudice an employer’s bargaining strategy in any future negotiations.” *Bakersfield Californian*, supra, at 1213.

Accounts Payable Clerk Patricia Pumphrey

Patricia Pumphrey is the Accounts Payable Clerk and has been employed by the Employer for 21 years. Her office is located next to the General Manager’s office. Her work appears to be largely self-directed, but she described her direct supervisor as the Board of Directors. Pumphrey acts as the Employer’s bookkeeper and is responsible for reviewing invoices and paying them. In reviewing invoices, part of her duties involves making sure billed work was actually performed. She also codes invoices and uploads them into the computer system. She is responsible for payroll and making sure employees are paid for their hours worked. In order to calculate employees’ pay, Pumphrey reviews their pay rate and timecards. As the accounts payable clerk, Pumphrey has access to information regarding all of the Employer’s expenses. Pumphrey also has access to employee personnel files and is responsible for making copies of new employees’ paperwork and placing it in their file.

Pumphrey testified that she does not attend the meetings of the Board of Directors or have access to minutes of their meetings. However, the Employer presented evidence that on at least one occasion, she was copied on an email attaching notes of an “organizational meeting.” There is also evidence that Pumphrey was occasionally copied on emails attaching bargaining proposals and tentative agreements. Pumphrey testified that it was her role to print out the proposals and place them on the general manager’s desk. She denied that she received proposals prior to their presentation to the Union.

The Employer contends that Pumphrey is a confidential employee because she has regular access to bargaining proposals before they are sent to the Union. Under *Pullman* and its progeny, the party asserting confidential status must prove that the disputed employee has regular access to confidential information *before* it is shown to the union. See *Bakersfield Californian*, at 1213; *Associated Day Care Services*, at 181. The evidence proffered by the

Employer, however, is insufficient to establish that Pumphrey has access to bargaining proposals before their submission to the Union — particularly given Pumphrey’s strong denial on the matter. Although the Employer introduced emails on which Pumphrey was copied, which attached certain revised proposals and tentative agreements, there was absolutely no testimony providing context to those emails or otherwise establishing that Pumphrey was copied on the bargaining materials before they were submitted to the Union. Her access to minutes of management meetings, payroll records, and financial information is also insufficient to establish confidential status. See *Lincoln Park Nursing Home*, supra, at 1164. Pumphrey’s other duties do not show that she shares a confidential relationship with managers responsible for determining, formulating, and effectuating labor relations policy. Therefore, I find that Pumphrey should be included in the petitioned-for bargaining unit of office clerical employees.

Accounts Receivable Clerk Robin Edwards

Robin Edwards is employed as the Accounts Receivable Clerk. General Manager Kane, who is responsible for overseeing the Employer’s operations, directly supervises Edwards. Edwards’ primary responsibilities involve billing customers, setting up new customer accounts, and receiving and depositing checks. As a bookkeeper, Edwards has access to the Employer’s financial records. She also handles all the bookkeeping for a restaurant operated by the Employer within the premises of the Philadelphia facility. She also suggests ways to improve internal office procedures, such as those related to billing, but does not play any role related to the Employer’s employment policies. Edwards testified that she has no involvement in collective-bargaining negotiations and does not attend Board of Directors meetings.

Aside from her bookkeeping duties, Edwards handles duties related to employees’ health and welfare benefits, workers’ compensation claims, leave calculations, and time and attendance. Edwards enrolls non-Union employees in health insurance based on their coverage selection. Edwards is also responsible for calculating employee contributions to the Union’s health and welfare, pension and supplemental income funds. These contributions are calculated by looking at each employee’s hours worked and rate of pay. She submits workers’ compensation claims to the Employer’s insurance company, but plays no additional role related to these matters. Additionally, Edwards calculates employees’ personal time off and sick and vacation days based on formulas in the collective-bargaining agreements. Under the direction of the General Manager, Edwards has sent an email asking the Employer’s legal counsel whether she should pay an employee who was scheduled to go on vacation during a strike. Edwards also flags time and attendance violations and alerts management. The General Manager instructs her to type up discipline warnings after management determines that discipline is warranted. Edwards did not recall whether she ever attended a meeting where discipline was determined.

I find that Edwards is not a confidential employee. General Manager Kane is clearly a managerial employee who “formulate[s], determine[s], and effectuate[s] management policies in the field of labor relations.” See *Waste Mgmt. de Puerto Rico*, supra, at 262, fn. 2. Although there is scant evidence regarding Kane’s labor relations duties, he is the highest ranking management official outside the Board of Directors, he serves on the Employer’s bargaining committee, and he certainly appears to play an important role in employee discipline. However,

the evidence does not support that Edwards plays a confidential role in assisting Kane with his labor relations duties. The Board has held that access to confidential financial records alone is insufficient to convey confidential status. *The Washington Post Co.*, supra, at 196. Similarly, employees who type up discipline and report time and attendance violations have been found not to be confidential. *Lincoln Park*, supra, at 1164 (typing disciplinary warnings); *RCA Communications*, 154 NLRB 34, 37 (1965) (reporting time and attendance violations); *Ladish Co.*, 178 NLRB 90, 90 (1969) (alerting management about justifiability of absences). The remainder of Edwards' duties related to employee benefits and discipline are routine and involve making calculations using information and formulas contained in the collective-bargaining agreements. Therefore, I conclude that Edwards is not a confidential employee, and should be included in the petitioned-for bargaining unit of clerical employees.

CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time office clerical employees, including Receptionist, Accounts Receivable Clerk, and Accounts Payable Clerk, employed by the Employer at its facility located at 6700 Essington Avenue, Philadelphia, Pennsylvania.

Excluded: All other employees, including guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Teamsters Local 929 a/w International Brotherhood of Teamsters.

A. Election Details

The election will be held on **Wednesday, October 10, 2018** from 8:00 a.m. to 8:30 a.m. in the conference room located at the Employer's 6700 Essington Avenue, Philadelphia, Pennsylvania facility.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **Friday, September 28, 2018**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **Friday, October 5, 2018**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board,

1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: October 3, 2018

DENNIS P. WALSH
REGIONAL DIRECTOR
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